

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	CS Docket No. 01-129
Competition in the Market for the)	
Delivery of Video Programming)	

COMMENTS OF THE STATE OF HAWAII

I. INTRODUCTION

The State of Hawaii (“the State”),¹ by its attorneys, hereby submits its comments to the Commission’s Notice of Inquiry (“*NOI*”) in the above-captioned proceeding.²

In its *NOI*, the Commission seeks information and comment on issues related to competition in the market for video programming, the industry segments and technologies that provide programming services, and convergence of services and technologies.³ The State is particularly pleased that the Commission seeks input on the differences in programming choices available in the mainland and Hawaii.⁴

¹ The State herein comments through the Hawaii Department of Commerce and Consumer Affairs (“the Department”). A division of the Department – the Cable Television Division – is the State’s cable franchise administrator.

² See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 01-129, 66 Fed. Reg. 35431 (rel. June 25, 2001) (“*NOI*”).

³ See *Id.*

⁴ See *Id.* ¶8.

Like all states, Hawaii has a substantial interest in fostering the development and universal availability of video programming for its residents. While the State has a wide variety of interests in this proceeding, these comments focus on a single issue of unique importance to the State: the status of DBS service in Hawaii. The failure of the DBS industry to provide full and competitive DBS service to Hawaii is a formidable detriment to competition in the State's video programming market. It also denies the State the benefit of significant telecommunications infrastructure that is particularly well suited to the geography of the State and that has the potential to improve significantly Hawaii's telecommunications capabilities, especially given the prospect of DBS access to the Internet. The creation and current success of DBS is due in large part to the careful nurturing and advocacy of the Commission. Further Commission action is now required to ensure that DBS providers do not begin to backpedal and that DBS becomes a viable competitor to cable in Hawaii.

II. BACKGROUND

The State's comments in the programming competition NOI proceeding last year documented the wholesale failure of DBS providers to offer adequate service to the people of Hawaii.⁵ Their failure to provide full and competitive service equivalent to that provided to the mainland was with conscious disregard to the express provisions of the Communications Act⁶ and the Commission's DBS rules.⁷ Specifically disappointing were the lack of competitive

⁵ See *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Reply Comments of the State of Hawaii, CS Docket No. 00-132 (Sept. 29, 2000) ("Hawaii NOI Reply Comments").

⁶ See 47 U.S.C. § 303(g); 47 U.S.C. § 307.

⁷ See 47 C.F.R. § 100.53.

programming and high prices as compared to monopoly cable offerings.⁸ Compounding this sub-par service were certain professed beliefs that a provider was never obliged to adequately serve the State.⁹ The DBS providers held such views despite the fact that the Commission itself has long since concluded that the provision of full service is necessary to “provide important MVPD competition” for cable television¹⁰ and “equitable distribution of service throughout the nation”¹¹ as called for in the Communications Act.¹² Five years after the Commission ruled Hawaii should be served, DBS providers had still not taken steps to configure their systems to efficiently serve Hawaii.

The *2000 Competition Report* confirmed the State’s beliefs.¹³ The report revealed that direct-to-home subscribership in Hawaii lagged at approximately 1% as compared to the 10% penetration rate in 44 states and 20% penetration rate in 24 states.¹⁴ In a state with a terrestrial cable television penetration rate among the highest in the nation and where cable operators charge more on average than MSOs on the mainland, the low DBS penetration rate in Hawaii could not be attributed to lack of demand.

⁸ See *Hawaii NOI Reply Comments* at 2.

⁹ *Id.*

¹⁰ See *Direct Broadcast Satellite Service*, Notice of Proposed Rule Making, FCC 98-26, 63 Fed. Reg. 11202 ¶ 33 (rel. Feb. 26, 1998)(indicating that provision of service to Alaska and Hawaii will provide important MVPD competition).

¹¹ See *Direct Broadcast Satellites*, 90 FCC 2d 676, 680 (1982)(citing 47 U.S.C. § 307(b)).

¹² See *Id.* at 686.

¹³ See *In the Matter of Annual Assessment of The Status of Competition in the Market for the Delivery of Video Programming*, 7th Annual Report, CS Docket No. 00-132, FCC 01-1, 16 FCC Rcd 6005, 66 Fed. Reg. 7912 (rel. Jan. 8, 2001)(“*2000 Competition Report*”).

¹⁴ See *Id.* ¶66.

III. THE CURRENT STATUS OF DBS IN HAWAII

The status of DBS service, and, consequently, the status of competition in the market for the delivery of video programming in Hawaii has recently enjoyed some improvement. Despite these advances, however, significant improvement is still required. Hawaii suffers discrimination in the structure of DBS services provided as compared to the mainland states. Also, the Commission has yet to rule on the precise geographic and substantive scope of DBS providers' service obligations. In sum, the State is anxiously awaiting the advent of meaningful programming competition and tangible evidence that DBS providers manifest a serious intention to provide, and to continue to provide, DBS infrastructure to Hawaii.

The following provides a status report on the two DBS providers currently serving Hawaii.

A. DIRECTV

In September 2000, Directv began offering limited DBS service in Hawaii.¹⁵ Two programming packages are offered.¹⁶ Unfortunately, however, Directv service has several shortcomings that rise to the level of service discrimination against consumers in the State. Shortcomings exist in the areas of programming, marketing, and equipment. These deficiencies make Directv offerings an ineffective competitive alternative to cable.

1. Programming.

Directv's programming offerings in Hawaii are not comparable to those on the mainland because Hawaii is singled out for a different program structure than that offered in each of the 48

¹⁵ See News Release, *Directv Offers Programming Service in Hawaii* (Sept. 14, 2000) found at <http://www.directv.com/press/pressdel/0,1112,358,00.html>.

¹⁶ See *Id.* The "Hawaii Choice Plus" package offers about 46 channels at \$21.99 per month. The "Option Hawaii Plus" package offers about 66 channels at \$23.99 per month.

mainland states. Directv's "Hawaii Choice Plus" package includes about 46 channels of core material programming for \$21.99. Unfortunately, the package lacks some of the most popular and informative programming available such as CNN, Headline News, The Weather Channel, Discovery Channel, ESPN, TBS, TNT and USA Network. Directv's "Hawaii Choice Plus" package also does not offer any local network or national broadcast network programming. The lack of such core programming puts Directv's offerings at a distinct disadvantage to other DBS and cable offerings in Hawaii.

Further, Directv's offerings in Hawaii pale in comparison to Directv's programming offerings in the 48 mainland states. On the mainland, Directv offers 11 programming packages, with its two basic packages offering over 50 basic channels for \$21.99 and over 105 basic channels for \$31.99 per month.¹⁷ Directv's "Total Choice" basic package offers consumers on the mainland 15 more core national programming channels than the "Hawaii Choice Plus" package offers Hawaii's consumers.

Further, Directv has exclusive rights to a number of popular programming services such as "NFL Sunday Ticket," but Directv does not provide these exclusive services in Hawaii, making them completely unavailable to consumers in the State. Also, while Directv claims to offer 19 premium movie channels on an a la carte basis, many of these channels appear to be merely time-shifted versions of HBO and Showtime. Directv's offerings, in the aggregate, fall far short of the programming packages that it makes available in the mainland and also are not comparable to the programming made available by major cable operators in the State.¹⁸

¹⁷ See <http://www.directv.com/programming/programmingpages/0,1093,135,00.html>.

¹⁸ Major cable providers in Hawaii generally offer 45-69 basic and 26-30 premium channels.

Finally, a significant portion of the programming being offered by Directv in Hawaii is Spanish-language programming.¹⁹ Although the State is pleased that Directv is offering such programming, it is unclear why so much of Directv's programming in Hawaii is geared towards a demographic representing only 7.2% of Hawaii's population.²⁰ One possible explanation for Directv's programming choice is that it is providing extensive Hispanic programming in Hawaii based upon what is merely technically convenient based on the services Directv provides to the largely Hispanic market in California (32.4%).²¹ The State believes that Directv should dedicate more of its satellite capacity to providing Hawaii with more complete basic services similar to what is available on the mainland instead of providing inferior basic packages and afterthought programming geared to a small demographic based on mere technical convenience.

2. Sales Efforts.

According to retailers in Hawaii, Directv's service offerings are not attractive to most consumers and are not being sold in significant numbers.²² Because of the inadequate offerings, retailers in Hawaii appear reluctant to carry Directv's equipment. At the present time, none of Directv's major account holders serving mainland customers (such as Circuit City, Sears and Radio Shack) offer Directv's service in Hawaii. Instead, Directv indicates on its website that five independent distributors are marketing its service. When contacted, only four of the retailers reported carrying Directv's equipment and they said customer interest in Directv's service is

¹⁹ One of Directv's two DBS offerings in Hawaii is "Opcion Hawaii Plus", which contains 20 Spanish language channels in addition to the English language channels provided in the "Hawaii Choice Plus" package.

²⁰ See the U.S. Census Bureau's web page at <http://www.factfinder.census.gov>.

²¹ See *Id.*

²² This information was gathered in a survey conducted by the State in March 2001.

weak.²³ Therefore, Directv does not appear to be making a serious effort to market its services in Hawaii.

3. Equipment.

Hawaii's customers must use significantly larger dishes to obtain DBS services than mainland customers. While most mainland Directv receive dishes measure 18 inches in diameter, in Hawaii a 39-inch by 29-inch dish is required. In some instances, DBS customers must purchase and install *two* dishes to obtain the programming they desire.²⁴ These consequential additional equipment costs and accompanying cosmetic defects are often prohibitive to consumers. This extra equipment is in *addition* to any over-the-air antennas consumers may require to view local broadcast networks.

B. ECHOSTAR

The State is pleased to acknowledge that EchoStar has made progress improving its DBS offerings in Hawaii. While EchoStar has performed significantly better than Directv, there are still opportunities for improvement. Specifically, EchoStar has programming deficiencies as compared to the continental United States and equipment problems similar to that of Directv.

EchoStar, doing business as the DISH Network, offers three programming packages in Hawaii. EchoStar offers its "America's Top 100" package in Hawaii for the same price as it offers the same package in the mainland United States (\$30.99 per month). The programming offered in the package is also identical to the same package offered on the mainland. But, while sales appear strong, retailers report substantial demand in Hawaii for EchoStar's heavily

²³ See Ex Parte Letter from the State to the FCC Secretary, IB Docket No. 98-21 (Mar. 16, 2001).

²⁴ Two dishes are needed to receive both English and Spanish language programming. See *Directv Service In Hawaii, Q&A Section* at <http://www.directv.com/programming/programmingtablepages/0,1115,348,00.html>.

promoted “America’s Top 150” package.²⁵ Unfortunately, the “America’s Top 150” package can be received in Hawaii only by purchasing two satellite dishes, doubling the equipment and installation costs to more than \$500.

Frustration over the high start-up costs for EchoStar’s “America’s Top 150” package was recently exacerbated when EchoStar ran a brief promotion that permitted subscribers of EchoStar’s “America’s Top 100” package to receive all of the “America’s Top 150” channels using only one 24-inch dish. The temporary promotion demonstrated conclusively that EchoStar has the technical capability to provide “America’s Top 150” to Hawaii using only one small receive dish. Thus, the State does not understand why EchoStar refuses to provide such service on a permanent basis.²⁶

IV. COMPARISON OF DBS AND CABLE IN HAWAII

The State recently compiled extensive programming and pricing information comparing Directv, EchoStar, and Oceanic Cablevision (“Oceanic”), the largest cable provider in Honolulu. Analysis of this data reveals that major cable companies in Hawaii offer more programming at better prices than DBS. For example, Oceanic’s basic digital programming package provides 99 channels (including local channels at no extra charge) for \$42.99 per month and offers over 50 music channels, 40 premium channels, and 52 pay-per-view channels for an additional charge. Compared to EchoStar’s almost identically priced “America’s Top 100” package (including optional local network channels),²⁷ Oceanic offers approximately five more basic channels, three

²⁵ The “America’s Top 150” package includes nine additional movie channels, seven additional sports channels, six additional family channels, five additional learning channels, and 18 music channels among others.

²⁶ See Ex Parte Letter from the State to the FCC Secretary, IB Docket No. 98-21 (Mar. 16, 2001).

²⁷ EchoStar’s “America’s Top 100” package costs \$41.97 per month when customers order the nine broadcast network channels offered to subscribers at an additional cost of \$10.98 per month.

more local channels, over 20 more music channels, 17 more premium channels, and 30 more pay-per-view channels. Compared to Directv's "Hawaii Choice Plus", Oceanic offers at least 40 more basic channels, 12 more local channels, 21 more premium channels, and 12 more pay-per-view options. Directv does not offer subscribers in Hawaii the option of purchasing local channels or music channels. While the pricing of Directv's offerings are lower than Oceanic's basic digital programming package, Directv does not offer programming options remotely comparable to Oceanic's at any price.

V. RECOMMENDATIONS

In its *NOI*, the Commission seeks input regarding barriers to increased competition.²⁸ It is clear to the State that the failure to fully comply with the geographic service rules in Section 100.53 is a formidable barrier to competition in the video programming market. As Hawaii has urged the Commission to acknowledge in related proceedings, the existing geographic service rules for DBS mandate that licensees must provide DBS services in Hawaii that are comparable to (and, therefore, competitive with) the mainland.²⁹ Until this occurs, cable will retain its monopoly over the provision of video programming services in Hawaii.

The Commission has had a proceeding open to address this very issue for over three years.³⁰ Unfortunately, the Commission has yet to release an order clarifying the specific service

²⁸ See *NOI* ¶ 7.

²⁹ See 47 C.F.R. § 100.53. See also *Petition to Deny or Hold In Abeyance of the State of Hawaii*, File No. SAT-LOA-20010518-00045 (July 19, 2001); *Petition to Deny of the State of Hawaii*, File No. SAT-LOA-20000505000086 (July 6, 2000); *Comments and Petition for Conditions of the State of Hawaii*, File No. SAT-MOD-20000607-00099 (June 27, 2000); *Petition to Deny of the State of Hawaii*, File No. SAT-PDR-19991217-00128 (Feb. 7, 2000).

³⁰ See *The Commission Requests Further Comment in Part 100 Rulemaking Proceeding on Non-Conforming Use of Direct Broadcast Satellite Service Spectrum*, Public Notice, FCC 00-426, 15 FCC Rcd 24418 (rel. Dec. 8, 2000). See also *In re Policies and Rules for the Direct Broadcast Satellite Service*, Notice of Proposed Rulemaking, IB Docket No. 98-21, 13 FCC Rcd 6907 (1998).

requirements of DBS providers. Until the Commission acts in the pending rulemaking or by enforcing its current rules, it is unlikely that significant competitive progress will be made. In fact, it is possible that one or both of the DBS operators in Hawaii may embrace the lukewarm consumer response to their limited programming offerings as justification to eliminate DBS service to Hawaii altogether.

Speedy resolution of DBS service requirements is essential if there is to be true competition between cable and DBS offerings in Hawaii. If the Commission would expeditiously release its DBS order or actively enforce its existing DBS service rules, there would be a clear positive impact on video competition in Hawaii. Only when DBS providers fully serve Hawaii will DBS become a formidable competitor to cable. Left as it is, the level and quality of DBS services in Hawaii will likely lag behind that offered in the mainland indefinitely. One of the main goals of DBS is to provide service to the traditionally underserved. This, coupled with the obvious technical ability to provide full service in Hawaii, should facilitate the Commission's decision.

VI. CONCLUSION

DBS offerings in the State are not comparable with the programming that is available in the 48 mainland states or with cable television services in Hawaii. While EchoStar has made progress in providing adequate DBS programming in the State, Directv lags far behind. The

Commission's interest in securing DBS service for Hawaii, as manifest in its rules and orders, has finally begun to show results. While consumers technically have choice between cable and DBS providers, the choice is not a truly a comparable or competitive one at this time. Therefore, while there has been some improvement, real improvement in the status of DBS in Hawaii is suspended pending Commission action.

Respectfully submitted,

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